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ABSTRACT

One critical area in government campaigns to combat terrorism is the management and manipulation of information. This is information which is both produced by governments and private information that governments believe will be useful in the fight against terrorism. Governments are reviewing their information policies regarding access and privacy. Some countries' policies have already been directly influenced by the events of September 11 and have changed to meet the perceived new demands of combating terrorism. There are two very important areas of information policies that have changed in many countries: access to information, whether government produced or not, and privacy from government intrusion into personal information. This paper focuses on access to information. Playing a critical role implementing in these measures are information specialists and librarians who are being told to deny their patrons information while at the same time being forced to surrender information long thought of as confidential. This paper looks at the considerations and changes regarding government information made by a number of countries after September 11, as well as examining several examples of the government seeking to control private information sources, commercial and nonprofit, on grounds of security or the need to prevent "hate crimes" against threatened minority populations. (AEF)

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A look at changes in government information policies after September 11

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Introduction

In the aftermath of September 11, governments around the globe have reassessed their security protections in light of the extreme measures that the followers of Osama bin Laden are willing to take to carry out their anti-American campaign. If civilian planes can become missiles, what other instruments of everyday life may be used to wreck destruction? In response many governments have launched campaigns to combat this new level of terrorism.

One critical area in government campaigns to combat terrorism is the management and manipulation of information. This is information which is both produced by governments and private information that governments believe will be useful in the fight against terrorism. Governments are reviewing their information policies regarding access and privacy. Some countries' policies have already been directly influenced by the events of September 11 and have changed to meet the perceived new demands of combating terrorism. There are two very important areas of information policies that have changed in many countries: access to information, whether government produced or not, and privacy from government intrusion into personal information. We will focus on access to information. Playing a critical role implementing in these measures are information specialists and librarians who are being told to deny their patrons information while at the same time being forced to surrender information long thought of as confidential.

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Access to Information

Many countries have had a long tradition of providing access to information through regular publication of information and also public use of freedom of information statutes. Such practices are earmarks of a democratic government by providing a way for the people to check the actions of their governments. These measures have always been limited by such constraints as "national security" and privacy, but in the aftermath of September 11 new limitations on government information are being adopted by countries. Government agencies are arguing that a new level of scrutiny is needed, since some published information could aid the efforts of terrorists. This paper will look at the considerations and changes regarding government information made by a number of countries after September 11. We will also look at several examples of the government seeking to control private information sources, commercial and nonprofit, on grounds of security or the need to prevent "hate crimes" against threatened minority populations.

The United States government has had a history of being one of the most open governments in the world with its diverse programs for distribution of government information and freedom of information acts (FOIA). Historically, government information is distributed through the Federal Depository Libraries program, but recently the use of the internet has provided an increasing amount of direct public access to agencies' information sources. FOIA requires Federal agencies to provide answers to individuals' requests for information held by the agencies or provide statutory cause for not giving an answer. These acts almost put agencies on the defensive when information requests are made of them. We will now focus on information published by the United States government whether required by statute or as a matter of internal policy of the agencies to provide that information and how access to information has changed.[1]

In the aftermath of September 11 there was a concern over the use of published government information by terrorists to cause further damage and harm to the country. Here are just a few examples of some of the information pulled from public access according to the watchdog group OMBWatch.[2] The Department of Transportation has removed mapping information of pipelines because of the pipelines' vulnerability to attack.[3] The Environmental Protection Agency is limiting the content of and the access to its databases and requiring registration protocols to track users of the information.[4] The Federal Energy Regulatory Commission has removed its information on energy facilities from its website.[5]

It is not only from the internet that information is being removed and restricted by government

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[1]Publishing means any distribution or making widely available for public use of information held by the government. Means of publishing includes the federal depository program, direct issue by an agency of a printed item, or posting on the internet.

[2]See OMB Watch at http://ombwatch.org for further details of this organization and its reports on access to government information post September 11th.

[3]Office of Pipeline Safety, Department of Transportation at http://www.npms.rspa.dot.gov/data/npms_data_down.htm.

[4]OMB Watch, *Access to Government Information Post September 11th*, at http://www.ombwatch.org/article/articleview/213/1/104/ and Environmental Protection Agency, *Envirofacts*, at http://www.epa.gov/enviro/html/l ef_access.htm.

[5]David P. Boergers, Statement of Policy of Previously Published Documents, Federal Energy Regulatory Commission 97 FERC 61,030 (Oct. 11, 2001) at http://cips.ferc.fed.us/Q/CIPS/MISC/PL/PL02-1.000.TXT.

agencies. The United States Geological Survey requested the removal of a CD-ROM sent to libraries through the Federal Depository Library Program run by the Government Printing Office.[6] The National Archives and Records Administration has removed access to materials within its holdings.[7]

The Federal Depository Library Program (FDLP) looked at the issues of removing government information from public access in the November 15, 2001 issue of *Administrative Notes*.[8] The remarks of the Superintendent of Documents Francis J. Buckley, Jr. at the Depository Library Council Meeting on October 15, 2001 reminded the librarians that the Government Printing Office (GPO) through the FDLP seeks to carry on the statutory duties of distributing government information to the people of the United States.[9] He reminds government documents librarians, "The purpose of the Federal Depository Library Program is to make Government publications available for the free use of the general public and restricting such access is a direct violation of Title 44 [of the United States Code]."[10] Issues of distribution and content of government publications were still being reviewed by the publishing agencies at the time of the council meeting. Buckley reminded the librarians that documents have previously been requested to be removed from depository libraries, averaging a couple such requests each year over the last few decades.[11] The procedures for removing a document from a collection received through the program could only be done with permission of the Public Printer, the Superintendent of Documents, or their agents. The publishing agency could order a publication to be removed, but only the directions of the GPO and its officials should be followed concerning depository materials.[12]

Probably the most striking change in the stance of government officials was Attorney General John Ashcroft's direction to heads of all federal departments and agencies. In a memorandum he told the

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[6]Ariana Eunjung Cha, *Risk Prompt U.S. to Limit Access to Data: Security, Rights Advocates Clash Over Need to Know*, WASHINGTON POST, Feb. 24, 2002 at A01.

[7]National Archives and Records Administration, *Access to Archival Materials in the Context of Concern about Terrorism*, at http://www.nara.gov/research/access_factsheet.html.

[8]Federal Depository Library Program Government Printing Office, ADMINISTRATIVE NOTES, Nov. 15, 2001. Available at http://www.access.gpo.gov/su_docs/fdlp/pubs/adnotes/ad111501.html.

[9]Francis J. Buckley, Jr., *Developments in the FDLP: Remarks by Francis J. Buckley, Jr., Superintendent of Documents*. ADMINISTRATIVE NOTES, Nov. 15, 2001, at 6.

[10]Ibid. Section 1902 of Title 44 of the United States Code reads:

Government publications, except those determined by their issuing components to be required for official use only or for strictly administrative or operational purposes which have no public interest or educational value and publications classified for reasons of national security, shall be made available to depository libraries through the facilities of the Superintendent of Documents for public information.

[11]Id.

[12]Id. Buckley lays out the procedure for removing a publication in his statements to Depository Library Council.

federal officials to resist any request for information made under FOIA procedures.[13] If an agency was to deny a request, he states, "You can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[14] He points to the exception given to confidential advice and counsel given by lawyers in the FOIA as a reason for a denial of releasing information.[15] Supporters of FOIA have called Ashcroft's decision undemocratic. On Public Broadcasting Corporation's show *Now*, Jane Kirktley, Professor of Media Ethics and Law at the University of Minnesota, said about Ashcroft,

> What he's saying is, the deliberations of the agencies, the information that they obtain and exchange, the whole, how we get to where we are in our governmental policy is not gonna be something that will be readily available to the public. That's not democracy in my view. It may be an efficient way for a government to operate, but I don't think we can call it a democracy.[16]

In Canada, the federal government has its own debate about government information in light of the terrorist attacks. Canada's response to September 11 was the Anti-Terrorism Act of 2001 which received royal assent on December 18, 2001.[17] The act has at least three impacts on the government's information policy. First, greater allowances are given to the Attorney General in issuing certificates to prohibit the disclosure of government information in proceedings under the Canadian Evidence Act.[18] Second, limitations on telecommunication speech are extended against "spreading repeated hate messages."[19] Three, greater allowance for law enforcement to monitor telecommunications and business records for suspicious activities.[20] The first two points we will now examine while the last point will be discussed in the next section of this paper.

The government of Canada on October 15, 2001 introduced bill C-36 in the House of Commons. On October 19, 2001, Canada's privacy commissioner George Radwanski said that the bill would lead to

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[13]Memorandum from John Ashcroft, United States Attorney General, to Heads of all Federal Departments and Agencies (Oct. 12, 2001), at http://www.usdoj.gov/foiapost/2001foiapost19.htm.

[14]Id.

[15]Id.

[16]Jane Kirktley, *Remarks on Secret Government*, NOW WITH BILL MOYERS, (April 5, 2002) (transcript at http://www.pbs.org/now/transcript/transcript_secretgov.html.).

[17]Anti-Terrorism Act, S.C. ch. 41 (2001) (Can.). Available at http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_4/C-36_cover-E.html.

[18]Department of Justice, *Amendments to the Anti-Terrorism Act*, at http://canada.justice.gc.ca/en/news/nr/2001/doc_27904.html.

[19]Department of Justice, *Anti-Terrorism Act Receives Royal Assent*, at http://canada.justice.gc.ca/en/news/nr/2001/doc_28215.html.

[20]Id.

"widespread denial of access to government information."[21] He pointed to the provisions of the bill concerning the Attorney General's certificates saying the bill would put "federal departments and agencies . . . entirely outside the reach of privacy law. Where a certificate is issued, privacy law would not apply at all."[22] After the passage of the bill, Val Werier wrote in the *Winnipeg Free Press*, "In an over reaction to Sept. 11, the government can now do away with any independent review and appeal under the new antiterrorist act. No longer will there be independent scrutiny to determine if secrecy is justifiable on government records."[23] There is concern that the elected Attorney General will abuse this new policy preventing independent review of requests of information disclosure by the privacy commissioners or the courts. The Canadian Association of Journalists (CAJ) stated, "the federal government's new antiterrorist legislation is a draconian step that severely limits access to government information."[24] The president of CAJ said, "Citizens use the Access to Information act routinely, and anyone who cares about government or how we are governed should be concerned."[25]

In Scotland, the issue of access to government information was debated during the Scottish Parliament's consideration of that nation's Freedom of Information (Scotland) Bill which was passed January 17, 2002.[26] It was taken for granted the public should have a right to access information held by the government; however, there was debate over limitations to this right. The Scottish National Party expressed concern over class exemptions, ministerial vetoes, and the cost of accessing information.[27] It is the use of the ministerial vetoes which impacts the topic of this paper. Can ministers use the fear of terrorism to withhold information?

The Campaign for Freedom of Information (CFOI) addressed this issue in December 2001 in its "The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill."[28] Mention is made of the new Canadian amendment allowing a veto on grounds of security.[29] CFOI feels that no ministerial veto is necessary since several other democratic

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[21] *Canada's Privacy Commissioner says Act Would Deny Access to Information*, CANADIAN PRESS, Oct. 19, 2001 at 2001 WL 29536639.

[22] Id.

[23] Val Werier, *Focus: Open Government Shuts Down*, WINNIPEG FREE PRESS, Jan. 10, 2002, at A12.

[24] Erik Denison, *Anti-terrorism legislation too restrictive: CAJ*, CBC NEWS, Oct 29, 2001. Available at http://vancouver.cbc.ca/template/servlet/View?zone=Vancouver&filename=bc_caj011029.

[25] Id.

[26] BBC News, *MSPs vote in favour of information bill*, Jan. 17, 2002 at

http://news.bbc.uk/hi/english/uk/scotland/newsvid-17650000/1765101.stm.

[27] Id.

[28] The Campaign for Freedom of Information, *The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill*, available at http://www.cfoi.org.uk/vetopaper.pdf.

[29] Id. at 1.

states have not included such a measure in their FOIAs.[30] The Campaign feels that government ministers should not have unchecked authority to veto information access. CFOI would not allow vetoes in relation to policy formulation, the burden of proof would be placed on ministers to show that there is a need for non disclosure, and the costs of judicial review of minister veto certificates should be met by public funds.[31] The Scottish FOIA is felt to be a model for the rest of Britain even with the problems mentioned by its detractors.[32]

Governments are also seeking to prevent the distribution of private information on grounds of security and protection of minority population. The Canadian government shut down at the request of the United States the site www.overthrow.com on grounds, described not too specifically, of sedition, hate, and terrorism.[33] The British government reportedly shut down the website of Sakina Securities because of its content of bomb making lessons for young Muslims.[34] Another site was closed down because of links with Azzam Publications urging support for Muslims and calling for donations to the Taliban.[35] The Electronic Frontier Foundation feels the post September 11 stance by many governments is causing the greatest challenge ever to freedom of speech and its related right of access to information whether provided by governments or private parties.[36] The United States military did its own preventive steps to deny the public information from private sources regarding the fight against terrorism. It took the unusual step of buying all images of Afghanistan taken by a private satellite Ikonos instead of using its authority over "shutter control" of the satellite's imaging systems. Buying the images allows the government to control them denying any use of the images like revealing military forces locations while avoiding constitutional arguments of free speech.[37]

Arguments against the restriction of government information come from a broad spectrum of individuals and organizations. Jeremiah D. Baumann, the Environmental Health Advocate for the United States Public Interest Research Group (PRIG), made a statement before the U.S. House of Representatives Committee on Transportation and Infrastructure on November 8, 2001 against some of

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[30]Id. at 7.

[31]Id. at 7-8.

[32]BBC News, *MSPs vote in favour of information bill*, Jan. 17, 2002 athttp://news.bbc.uk/hi/english/uk/scotland/newsvid-17650000/1765101.stm.

[33]Bill White, *Canadian Feds Shut Down Overthrow.com*, INDEPENDENT MEDIA CENTER-WEBCAST NEWS, Nov. 9, 2001 at http://www.indymedia.org/front.php3?article_id=86499&group=webcast

[34]Reteurs, *Britain Closes Extremist Site*, WIRED NEWS, Oct. 4, 2001, at p://www.wired.com/news/print/0,1294,47307,00.html.

[35]Johnson Hor, *Chilling Effects of Anti-Terrorism: "National Security" Toll on Freedom of Expression*, ELECTRONIC FRONTIER FOUNDATION at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/antiterrorism_chill.html#websiteshutdownothergov.

[36]Id.

[37]Duncan Campbell, *US Buys Up All Satellite War Images*, GUARDIAN, Oct. 17, 2001 at http://www.guardian.co.uk/waronterror/story/0,1361,575594,00.html.

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the new restrictions on government information.[38] He argues that while the government should be taking steps to protect government information from use by a terrorist, it should not do so at the cost of lost protection of the general public. His concern deals with the Environmental Protection Agency's discontinuation of posting on the agency's web site information about chemical storage. The public can no longer keep itself informed about the possible hazards in their communities. Restricting the data makes it harder for local communities to be prepared for emergencies, including attacks by terrorists. The restriction also eliminates a check on industry by allowing it to escape scrutiny of the public. Baumann believes that the grounds for excluding publication of information already in freedom of information acts provide enough protection for security.

Baumann offers three factors for determining the withholding of information. First, what is the benefit to public safety by making available to the public the information in question? Second, what type of information is being withheld, whether it is general enough to alert the public while not being specific enough to aid terrorists? Third, what is the availability of the information from other sources?[39]

Roles of Librarians

When Joy Suh, the government documents librarian at George Mason University, received a letter telling her to destroy a CD-ROM containing details of the country's water supply, she complied without hesitation, but now she worries that this move represents the beginning "of a more secretive period in American society."[40] Suh said, "I debate both sides in my mind. I see the government aspect of it. I also see how researchers and the public might need this data."[41] This dilemma faces all librarians. Librarians contend with changes in government information policies from both sides. They seek to provide full access to information for their patrons while also protecting their patrons' privacy from government intrusion.

For U.S. librarians there are concerns that the USA Patriot Act intrudes upon the confidentiality of patrons' records of use of library resources. Miriam Nisbet, the legislative counsel for the American Library Association, holds that the act gives law enforcement the right to access to business records which could include patron records kept by libraries.[42] The typical practice at American academic libraries is to destroy any record of a use of a library item after the item's return. At Cornell University, Ross Atkinson, deputy university librarian, finds it troublesome that records of patrons' transactions are kept for thirty-five days on backup tapes. These are needed in case of computer crashes and the time lag before the tapes' destruction cannot be shortened. Probably greater concerns for privacy are the probable login records kept of library users accessing electronic information resources from off campus. These

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[38]Jeremiah D. Baumann, *Right to Know Details of Chemical Supplies*, CONGRESSIONAL TESTIMONY BY FEDERAL DOCUMENT CLEARING HOUSE, Nov. 8, 2001, 2001 WL 26187661.

[39]Id.

[40]Ariana Eunjung Cha, *Risk Prompt U.S. to Limit Access to Data: Security, Rights Advocates Clash Over Need to Know*, WASHINGTON POST, Feb. 24, 2002, at A01.

[41]Id.

[42]Scott Carlson and Andrea L. Foster, *Colleges Fear Anti-Terrorism Law Could Turn Them into Big Brother: Provisions about networks and library records raise privacy and academic-freedom issues*, CHRONICLE OF HIGHER EDUCATION, March 1, 2001, at A32.

records could even track what information the users are accessing.[43] Atkinson expresses concern that this act moves American society toward an Orwellian future.[44]

During consideration of the antiterrorism bill, representatives of the American Association of Law Libraries, the American Library Association, and Association of Research Libraries addressed in an open letter to members of Congress the concerns of librarians regarding the measures being undertaken.[45] Attached to the letter was a memorandum entitled *Library Community Statement on Proposed Anti-Terrorism Measures*.[46] Directly affecting librarians were concerns about the expanded use of pen registers and tracing devices on library computer networks and the easier access to business records including library circulation records. Recommendations were made that asked that law enforcement agencies be required to continue having to meet the high standard of obtaining a court order to access information and that law enforcement searches and intrusions should be as narrowly focused as possible.[47]

In Scotland, the Scottish Library and Information Council and Scottish Library Association made a response to the proposed Freedom of Information (Scotland) Bill during the consultancy stage.[48] The council and the association felt that the adoption of the Scottish FOIA is a welcome step in meeting the public's rights to and needs for information available for government agencies. Their concerns were the cost to individual members of the public seeking information and the recognition that an information commissioner was needed to govern the FOIA's provisions and to ensure full disclosure of information allowed by law and not politics.[49]

Librarians do need to be careful of being overzealous in denying users access to information. The FDLP reminded government documents librarians that it was the only body with authority to order withdrawal of documents in libraries collections. This reminder was issued after Mary Bennett, government documents librarian at State University of New York/Oswego, sent an email to fellow librarians urging them to withdraw from their collections documents from the Nuclear Regulatory Commission. Only the United States Government Printing Office may tell government documents

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[43]Id.

[44]Id.

[45]Letter from Mary Alice Baish, Associate Washington Affairs Representative, American Association of Law Libraries; Lynne Bradley, Director, Office of Government Relations, American Library Association; and Prudence S. Adler, Associate Executive Director, Association of Research Libraries, to Members of the United States Congress 1 (Oct. 2, 2001) (available at http://www.ala.org/washoff/terrorismletter.pdf).

[46]Statement from the American Association of Law Libraries, American Library Association, and Association of Research Libraries, to the United States Congress (Oct. 2, 2001) (available at http://www.ala.org/washoff/terrorism.pdf).

[47]Id.

[48]Scottish Library and Information Council and Scottish Library Association, An Open Scotland: Freedom of Information: A Consultation: Response by Scottish Library and Information Council and Scottish Library Association, at http://www.slainte.org.uk/Slicpubs/FreedomInfo.pdf.

[49]Id.

librarians to deny users access to government information.[50]

Conclusion

The impact of September 11 on information policies of governments continues and probably will so for the foreseeable future. There is risk of providing helpful information to terrorists when governments share with the public details of government resources and the results of government studies on a nearly unlimited number of subjects. But democratic governments cannot cut off the public from government information or invade the information privacy of the public without some harm to the freedom that a democratic government allows a country to have. Librarians and information professionals need to be in the vanguard of protecting access to public information and intrusion of private information. This is a duty that every librarian around the globe should embrace and fulfill as much as they can in their libraries, in the nations, and across national borders.

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[50] American Library Association, *GPO Turns Tables, Calls on Librarians Not to Restrict Access*, AMERICAN LIBRARIES: NEWS, March 4, 2002 at http://www.ala.org/alonline/news/2002/020304.html.

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